Supreme Court, U. S.
FILED
JAN 9 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

---

NO. 77-984

RAUL MASCARENHAS, Petitioner

v.

MERIDIAN HOSPITAL AUTHORITY, Respondent

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

William F. Kemp
P. O. Box 369
1900 American Bank Tower
Austin, Texas 78767

Counsel for Petitioner

INDEX


| | Page |
|---|---|
| Opinions below . . . . . | 2 |
| Jurisdiction . . . . . | 2 |
| Questions presented. . . . . | 2 |
| Constitutional and Statutory provisions involved . . . . . | 3 |
| Statement of the case. . . . . | 6 |
| Reasons for granting the writ. . . . | 12 |
| 1. The Decision Below Conflicts With Applicable Decisions of the Supreme Court; Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call For an Exercise of the Supreme Court's Power of Supervision; and Conflicts With the Decisions of Other Courts of Appeal on the Same Matter. . . . . | 12 |

2. The Court of Appeals Decided an Important State Question in a Way in Conflict With Applicable State Law . . . . 19

Conclusion . . . . . 26

Appendix . . . . . A-1

Appendix 1. Opinion and Judgment of the Court of Appeals . . . . . A-1

Appendix 2. Opinion and Judgment of the District Court . . . . . A-18

Appendix 3. Article 4437e, Texas Revised Civil Statutes . . . . . A-40

Appendix 4. Order of the Court of Appeals Denying Rehearing . . . . A-58

CITATIONS

Cases:

Boire v. Miami Herald Publishing Company, 343 F. 2d 17 (5th Cir. 1965) . . . . . 19

Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525, 78 S.Ct. 893 (1958) . . . . 2, 15, 16, 17



Cone v. West Virginia Pulp and Paper Company, 330 U.S. 212, 67 S.Ct. 752 (1947) . . . . . 16

Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 83 S.Ct. 1210 (1963) . . . . . 16

Fountain v. Filson, 336 U.S. 681, 69 S.Ct. 754 (1949) . . . . . 16

Globe Liquor Company v. San Roman, 332 U.S. 571, 68 S.Ct. 246 (1948). . 16

Hoolich v. Retreat State Hospital, 354A. 2d 609 (Comm. Ct. Pa. 1976). . 25

Mascarenhas v. Meridian Hospital Authority, 560 F. 2d 683 (5th Cir. 1977). . . . . 2

Moses Lake Homes, Inc. v. Grant County, 276 F. 2d 836 (9th Cir. 1960). . . . . 18

Porter Memorial Hospital v. Harvey, 279 N.E. 2d 583 (Ct. App. Inc. 2d Dist. 1972). . . . . 24

Preston v. City of Philadelphia, 362 A. 2d 452 (Comm. Ct. Pa. 1976) . . . . . 25

Rochez Brothers, Inc. v. Rhoades, 527 F. 2d 891 (3rd Cir. 1975). . . . . 18

Tri-City Fresh Water Supply District No. 2 v. Mann, 135 Tex. 280, 142 S.W. 2d 945 (Tex. 1940) . . . . . 13, 21

Vilbig v. Housing Authority of the City of Dallas, 287 S.W. 2d 323 (Tex. Civ. App.--Dallas 1955, ref., n.r.e.). . . . . 25

Weade v. Dichmann, Wright and Pugh, Inc., 337 U.S. 801, 69 S.Ct. 1326 (1949) . . . . . 16

Statutes Cited:

Fifth Amendment, United States Constitution . . . . . 3, 4, 17

28 U.S.C. Section 1254(1). . . . . 2

28 U.S.C. Section 1332(a)(2) . . . . . 9

Rule 19 (1)(b), Rules of the Supreme Court of the United States . . . . . 17



Texas Constitution Article 3, Section 52 . . . . . 9

Artlcle 10, Texas Revised Civil Statutes . . . . . 4, 5, 6, 21, 22

Article 4437e, Texas REvised Civil Statutes . . . . 6, 10, 19, 21, A-40 - A-57

Article 4437e-2, Texas Revised Civil Statutes . . . . . 20

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

---

NO.

---

RAUL MASCARENHAS,
Petitioner

v.

MERIDIAN HOSPITAL AUTHORITY,
Respondent

---

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

The Petitioner, Raul Mascarenhas, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on October 11, 1977. Rehearing was denied on November 7, 1977.

## OPINIONS BELOW

The opinion of the Court of Appeals is reported, 560 F.2d 683 (App. 1).

The opinion of the District Court (App. 2) is not reported.

## JURISDICTION

The judgment of the Court of Appeals was entered on October 11, 1977. Timely Motion for Rehearing was filed, and was denied on November 7, 1977. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in ordering judgment for Respondent without a remand to give Petitioner an opportunity to introduce further evidence, in light of Byrd v. Blue Ridge Rural Electric Cooperative, 356 U.S. 531, 78 S.Ct. 893.

2. Whether the Court of Appeals, in holding that the Meridian Hospital



Authority did not have the power to sell its physical plant, decided an important state question in a way in conflict with applicable state law.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due

process of law; nor shall private property be taken for public use, without just compensation.

Article 10, Texas Revised Civil Statutes:

The following rules shall govern in the constitution of all civil statutory enactments:

1. The ordinary signification shall be applied to words, except words of art or words connected with a particular trade or subject matter, when they shall have the signification attached to them by experts in such art or trade, with reference to such subject matter.

2. The present or past tense shall include the future.

3. The masculine gender shall include the feminine and neuter.

4. The singular and plural number shall each include the other, unless otherwise expressly provided.



5. A joint authority given to any number of persons or officers may be executed by a majority of them, unless it is otherwise declared.

6. In all interpretations, the court shall look diligently for the intention of the Legislature, keeping in view at all times the old law, the evil and the remedy.

7. Whenever the law which shall have repealed another shall itself be repealed, the former law shall not be thereby revived without express words to that effect.

8. The rule of the common law that statutes in derogation thereof shall be strictly construed shall have no application to the Revised Statutes; but the said statutes shall constitute the law of this State respecting the subjects to which

they relate; and the provisions thereof shall be liberally construed with a view to effect their objects and to promote justice.

Article 4437e, Texas Revised Civil Statutes, is lengthy, and is set out in its entirety in the Appendix (App. 3).

STATEMENT OF THE CASE

In the late 1960's the City Council of Meridian, Texas, created the Meridian Hospital Authority, Respondent herein, pursuant to Article 4437e, Texas Revised Civil Statutes (App. 3). In 1968 the Authority secured federal financing in exchange for revenue bonds and in 1970 opened a new hospital and geriatric center. Pursuant to Article 4437e, the Authority had and has no power to tax and must raise all of its money through the sale of its bonds and the operation of its facility.



The new facility soon experienced financial difficulties due to the death of one of the town's two doctors. The remaining doctor had too few patients to fill the facility's beds and, as noted previously, the Authority had and has no power to tax. Behind in its bond payments, the Authority sought to attract new doctors to the area. Petitioner and Dr. Herman Burgos, both medical doctors in the State of Texas, were approached by the Authority in 1971 concerning moving their practices to Meridian.

As a result of ensuing negotiations, petitioner and Dr. Burgos, on July 12, 1971, executed a contract with the Authority. The doctors agreed to move their practices to Meridian and to maintain 24-hour coverage there for one year. The Authority granted the doctors an option to purchase the faci-

lity after two years. The consideration therefor was the assumption by the doctors of the outstanding indebtedness on the facility, some $660,000.00, plus the moving of the doctors' practices to Meridian.

After petitioner and Dr. Burgos came to Meridian the facility was soon doing well financially and the Authority became current on its bond payments. However, in mid-1973 the Authority's directors voted to rescind the contract. The two doctors' staff priviledges at the facility were soon cut back severely. Petitioner moved his practice out of Meridian in January 1974.

Petitioner and Dr. Burgos filed suit against the Authority in the United States District Court for the Western District of Texas in September 1973, alleging breach of contract, civil rights violations and certain causes of action in tort.



Petitioner is a citizen of Brazil, and Respondent is a citizen of Texas, which gave rise to jurisdiction in the District Court under 28 U.S.C. § 1332(a)(2), as the amount in controversy exceeded $10,000.00. As one of its affirmative defenses, the Authority pled that the contract was void because the Authority was without authority in law to contract to convey its assets. The trial was without a jury. After the doctors presented their case, Dr. Burgos settled with the Authority. The District Court held that the civil rights claims were without merit and that the contract's provision for sale of the facility was unenforceable because it was a "grant" of public property in violation of Texas Constitution Article 3 § 52, and was in violation of the Hospital Authority Act's provision that such hospitals must be

operated "without the intervention of private profit", Article 4437e § 14, Texas Revised Civil Statutes, (App. 3). The court also held that a three week suspension of Petitioner's staff privileges violated the contract for which it awarded Petitioner judgment against the Respondent Authority for $8,400.00. The District Court's opinion did not deal with the issue of the Authority's power to sell the facility. (See App. 2).

The Court of Appeals for the Fifth Circuit affirmed, but on a complete different basis (App. 1). The court held that the Authority did not have the power, under Texas law, to contract to sell its facility. Apparently reviewing the evidence, the court decided the Authority had attempted to "exit the hospital business altogether". (See App. 1). In a



footnote the court stated that it did not rule out the possibility of sale, however, if "truly necessary" to prevent the hospital from closing. It then said that the District Court found no such necessity and that the record did not indicate a sufficient necessity to trigger any such sales authority (App. 1). The court did not reach the two grounds on which the District Court decided the case (App. 1).

Petitioner seeks, by certiorari, (1) reversal and remand to the District Court with instructions to enter judgment for Petitioner for damages on the entire contract as valid based on the damages evidence adduced, or in the alternative, (2) reversal and a remand to the District Court so that Petitioner may present evidence on the necessity of the sale to prevent the facility from closing, or in the alternative, (3) reversal and remand

to the Court of Appeals to consider other grounds of appeal to determine if remand to the District Court is necessary, or other appropriate relief.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH APPLICABLE DECISIONS OF THE SUPREME COURT; HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION; AND CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL ON THE SAME MATTER.

The issue of whether the Authority had the legal power to contract to sell its hospital and geriatric center to private physicians was considered by both parties as strictly a question of law, to be resolved by briefs and not be evidence. The District Court's opinion did not even reach the issue, as it decided the case on other grounds. The Court of Appeals,



for the first time in the case, created an interpretation of the Authority's power to sell which in effect makes the power of sale in each case a fact question. In footnote number 8, the court stated that:

> "By this discussion we do not rule out the possibility of sale if truly necessary to prevent the hospital from closing. In the case at bar the district court found no such necessity, and the record does not indicate sufficient necessity to trigger whatever sales authority might exist."

The Authority had no express power of sale by statute and case authority indicated that the Authority's powers should be strictly construed. See Tri-City Fresh Water Supply District No. 2 v. Mann., 135 Tex. 280, 142 S.W. 2d 945

(Tex. 1940). The Court of Appeals also felt there is a potential power of abuse if such hospital authorities should have an unrestricted power of sale. However, other considerations led to the above quoted footnote. The Texas statute was enacted to encourage the building of hospitals in smaller communities. With no power to tax, however, such small city hospitals are very vulnerable financially. The instant case is a good example because the death of one of Meridian's two doctors financially crippled the hospital via empty beds. The Authority was forced to negotiate a sale of the hospital to attract enough doctors to keep the hospital open.

Petitioner submits that the Court of Appeals met these opposing considerations by making the power of sale in each case a fact issue - that is, by imposing the



"truly necessary" test for the first time. The serious error of the Court of Appeals raised in this point came when the court, after establishing the "truly necessary" standard, proceeded to try the case on that test in the Court of Appeals. The Court of Appeal's failure to remand for further evidence or at least to consider other grounds in the case flatly contradicts this Court's holdings in Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525, 78 S.Ct. 893 (1958). In that case, the Petitioner found himself facing an interpretation of a statute in the District Court which simply did not call for the introduction of evidence on his part. A reinterpretation in the Court of Appeals made the introduction of evidence potentially useful for Petitioner, but the Court of Appeals failed to order a remand to allow

him to do so. This Court reversed the Court of Appeals and remanded the case to that court for consideration of other grounds in the case. It gave directions to the Court of Appeals to remand to the District Court for a new trial if the case was not resolved by the Court of Appeals on such other grounds. Byrd is directly on point, but other relevant cases of this Court are Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 83 S.Ct. 1210 (1963); Fountain v. Filson, 336 U.S. 681, 69 S.Ct. 754 (1949); Weade v. Dichmann, Wright and Pugh, Inc., 337 U.S. 801, 69 S.Ct. 1326 (1949); Globe Liquor Company v. San Roman, 332 U.S. 571, 68 S.Ct. 246 (1948); Cone v. West Virginia Pulp and Paper Company, 330 U.S. 212, 67 S.Ct. 752 (1947).

Petitioner submits that the failure of the Court of Appeals to either consider other grounds of the case or to remand



for further evidence violates his right to due process of law under the Fifth Amendment to the United States Constitution in that this constitutional provision underpins the Byrd holdings described above.

Regarding Rule 19(1)(b) of the Rules of the Supreme Court, the Byrd case indicates that the Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court. The Byrd case also indicates that the Court of Appeals departed significantly from the accepted and usual course of judicial proceedings in failing either to remand for further evidence or to consider other grounds in the case. The Court should in particular review this sort of procedural error by a Court of Appeals because this Court is the only body with the power to see that Courts of Appeal follow proper civil procedure. This implies supervision

in at least some detail, otherwise procedure in Courts of Appeal will become too divergent and unpredictable. Therefore the procedural error complained of in this point calls for an excercise of the Court's power of supervision.

Finally, the failure of the Court of Appeals to either remand or consider other grounds is in conflict with the cases of and practice in other Courts of Appeal. For example, both the Ninth and the Third Circuits recognize that a remand for further evidence is in order where a deficiency in proof results from a misunderstanding shared by the trial court as to the meaning of a statute. Moses Lake Homes, Inc. v. Grant County, 276 F. 2d 836, 353 (9th Cir. 1970); Rochez Brothers, Inc. v. Rhoades, 527 F. 2d 891, 894, 895 (3rd Cir. 1975). The Fifth Circuit itself recognizes the



general principle that a reviewing court should remand a case to the district court for consideration of a question not previously considered. Boire v. Miami Herald Publishing Company, 343 F. 2d 17, 25 (5th Cir. 1965). As mentioned previously, this Court must insure acceptable uniformity of practice in the Courts of Appeal.

The above stated matters justify the grant of certiorari to review the judgment below.

2. THE COURT OF APPEALS DECIDED AN IMPORTANT STATE QUESTION IN A WAY IN CONFLICT WITH APPLICABLE STATE LAW.

The Court of Appeals interpreted the Texas Hospital Authority Act (App. 3) in a way which severely impairs its true purpose. The obvious intent of statute was to permit cities to create hospitals without drawing on precious tax funds or imposing taxes. However, this means that

a hospital authority, being unable to tax, must meet its bond payments solely from the operation of its hospital(s). This clearly means that such an authority should have whatever power is reasonably necessary to keep a hospital solvent, particularly where the hospital is the only one in the community. This includes the power to sell the hospital to private physicians if it appears reasonably necessary to do so to keep the hospital's doors open.

It is true that in 1975 hospital authorities were specifically empowered by statute to sell their facilities to non-profit buyers. (Article 4437e-2, Texas Revised Civil Statutes). However, this will often not be an attractive offer to a non-profit buyer. This is because such authorities are so financially vulnerable. If for some reason a doctor in a small town should



leave or die, a hospital can be thrown into dire financial straits simply due to the resulting empty hospital beds. It is a private physician who will be the interested buyer because he knows he can directly fill empty hospital beds. The non-profit buyer has the same problem as an authority - it still has to go find a doctor.

The Court of Appeals virtually foreclosed the very realistic alternative of private sale because the statute contained no express power of sale and a 1940 Texas case indicated that such an entity's powers should be either express or by clear implication. Article 4437e § 6, Texas Revised Civil Statutes; Tri-City Fresh Water Supply District No. 2 v. Mann, 135 Tex. 280, 282, 142 S.W. 2d 945, 946 (Tex. 1940). The court overlooked Article 10, Texas Revised Civil Statutes,

which provides that, in construing statutes, a court shall (1) look diligently for legislative intent, keeping in view the old law, the evil and the remedy, and (2) give a liberal interpretation to statutes, with a view to effect their objects and to promote justice.

Petitioner suggests that the Court of Appeals entirely overlooked the human dimension of the problem. First, as Petitioner's case amply demonstrates, the court is discouraging private contracts with quasi-municipal corporations altogether. It is a discouraging thing indeed to work under a contract for two years only to discover that the corporation can renege whenever it arbitrarily decides to do so. The corporation or authority then claims the contract is void and simply leaves the private person out



in the cold. It can be a very lonely feeling.

Second, consider the impact of the closing of a hospital on the community as a whole. In many cases, it will mean the closing of the only hospital in the area. Those who have heart attacks, strokes, accidents or babies would be gravely endangered. Those without means would go without care for serious diseases, such as cancer. Who would like to be in such a position? Also, many people in the community would lose their jobs. The federal government would lose the money it invested in the authority's bonds. The authority would lose all of its credit and would never again be able to function in the future. All these consequences could be prevented if such an authority could sell to a private physician under certain circumstances wherein the physician could trust the authority not to back out on

its contracts arbitrarily and at will.

So, a better way to construe an authority's powers is to regard its directors as fiduciaries for the community the hospital serves. This has been done where the hospital was tax supported. Porter Memorial Hospital v. Harvey, 279 N.E. 2d 583, 588 (Ct. App. Ind. 2d Dist. 1972). Then, in interpreting an authority's statutory powers, one always bears in mind that their overall duty is to make hospital services available to people in their community. Given that an authority has no power to tax, as a practical matter it must have a power of sale where its directors reasonably believe the same is necessary to keep the hospital open. Directors of an authority must at least have leeway based on a reasonable belief standard. If the Court of Appeals allowed any power of sale it was not on reasonable belief. The court's "truly necessary"



test, stated in a footnote, encourages legal advice not to sell under any circumstances, and therefore amounts to paralysis.

It has been held that a duty to provide medical care did not prevent a state or a city from closing a particular hospital. Hoolich v. Retreat State Hospital, 354 A. 2d 609, 611 (Comm. Ct. Pa. 1976); Preston v. City of Philadelphia, 362 A. 2d 452, 456, 457 (Comm. Ct. Pa. 1976). A Texas case has held that a housing authority, based on its general corporate powers, has the authority to sell lands it condemned when it is apparent that the authority will not use them in any housing project. Vilbig v. Housing Authority of the City of Dallas, 287 S.W. 2d 323, 331, 332 (Tex. Civ. App.--Dallas 1955, ref. n.r.e.).

The above stated matter justify the grant of certiorari to review the judgment below.

## CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,



William F. Kemp
P. O. Box 369
1900 American Bank Tower
Austin, Texas 78767
Counsel for Petitioner



## APPENDIX

APPENDIX 1

Raul MASCARENHAS,
Plaintiff-Appellant,

v.

MERIDIAN HOSPITAL AUTHORITY
et al., Defendants-Appellees.

No. 75-2682.

United States Court of Appeals,
Fifth Circuit.

Oct. 11, 1977.

Appeal from the United States District Court for the Western District of Texas.

Before TUTTLE, GOLDBERG and CLARK, Circuit Judges.

GOLDBERG, Circuit Judge:

The Meridian Hospital Authority contracted to sell its hospital to Dr. Raul Mascarenhas. He now challenges the Authority's refusal to comply with its bargain. Although ever hesitant to release a party from a negotiated bargain entered in good faith, we conclude that

the Authority lacked statutory authorization to sell its hospital and that the contract therefore is unenforceable.

I.

Meridian is a small town approximately 70 miles south of Fort Worth, Texas. In the late 1960's the city decided to build a new hospital. Pursuant to Tex.Rev.Civ. Stat. art. 4437e, the City Council passed a resolution creating the Meridian Hospital Authority. In 1968 the Authority secured federal financing in exchange for revenue bonds, and in January 1970 the new hospital opened its doors.[1]

The hospital immediately encountered financial difficulties. One of the town's two doctors died, and the other had too few patients to support the 32-bed facility. Behind on its bond payments and losing money, the Authority began a search for a new doctor.

In 1971, Dr. Mascarenhas, who practiced



in Burleson, 14 miles south of Fort Worth, passed through Meridian and visited the hospital. The chairman and other members of the Authority's Board of Directors approached Mascarenhas concerning moving his practice to Meridian. In ensuing negotiation, Mascarenhas and another Fort Worth physician, Dr. Herman Burgos, indicated an interest in moving to Meridian under an acceptable arrangement.

On July 12, 1971, Mascarenhas and Burgos executed a contract with the Authority. The doctors agreed to move their practices to Meridian and to maintain 24-hour coverage there for one year beginning immediately. In return, the Authority granted the doctors an option to purchase the hospital after two years. The purchase price apparently was to be the amount of outstanding indebtedness, $660,000. Each doctor would lose his option if "proven guilty" of "gross negligence."

The doctors initiated the promised coverage and used the hospital for their Fort Worth patients as well. The hospital began operating at near capacity levels, and its financial picture improved dramatically. The hospital became current on its bond payments.[2]

As the time approached when the doctors would be able to exercise their option to purchase the hospital, however, controversy over that possibility grew. On July 10, 1973, the Authority's Board of Directors voted 4-3 not to honor the contract. Although the Authority now contends that the reasons for that decision included the doctor's failure to provide 24-hour coverage at the hospital and their gross negligence, the district court found that the decision resulted primarily from a change in the membership of the Board.

From at least July 10 forward, relations



between the Authority and the doctors were strained. At an August 14 Board meeting, the Directors cancelled the staff privileges of Dr. Mascarenhas and Dr. Burgos, effective immediately. Later in August the doctors filed suit in federal court[3] challenging the staff privilege revocation and the refusal to sell the hospital. On September 4, 1973, the Authority notified the doctors that their staff privileges were being reinstated pending a hearing before the Board. The Authority gave the doctors notice of the alleged reasons for the termination, listing their negligence, professional incompetence and failure to be available for reasonably expected medical necessities. At the September 14 hearing, which generated enough public interest to require its removal from the hospital to the local courthouse, the Board heard testimony and decided to reinstate the doctors

but to limit their surgical privileges. The doctors, who were general practitioners, were not to perform any operations without the assistance of a surgeon.

The scene of battle then shifted once again to the federal courthouse. The district court tried the action without a jury. After the doctors presented their case in chief, Dr. Burgos settled his claim. Dr. Mascarenhas continued, though, and the district court held that the three-week suspension of the doctor's staff privileges was a violation of the contract, for which it awarded $8,400 damages. The court also determined, however, that the contract's provision for sale of the hospital was enforceable because inconsistent with the Texas Constitution's proscription of any "grant" of public property, Tex.Const. art. 3 § 52[4], and because violative of the Hospital Authority Act's provision that such



hospitals must be operated "without the intervention of private profit," Tex.Rev. Civ.Stat. art. 4437 § 14.

Dr. Mascarenhas appeals; the Authority does not. Thus the only issues before us are those relating to the sale. Although reaching our conclusion by a somewhat different route than the district court, we agree that the provision for sale of the hospital is unenforceable, and we therefore affirm.

II.

The City of Meridian created the Meridian Hospital Authority pursuant to the "Hospital Authority Act," Tex.Rev. Civ.Stat. art 4437e, § 1 et seq. That Act provides that the Authority is a "body politic and corporate," art. 4437e § 3, with the "power to construct, enlarge, furnish and equip Hospitals, purchase existing Hospitals, furnishings

and equipment for its Hospitals, and to operate and maintain Hospitals." art. 4437e § 6. The dispositive issue in this case is whether the Authority also possessed the power to sell its hospital.[5]

In Texas an entity such as this Authority "may exercise only such powers as have been expressly delegated to it clear and unquestioned implication." Tri-City Fresh Water Supply District No. 2 v. Mann, 135 Tex. 280, 282, 142 S.W.2d 945, 946 (1940).[6] Although in the intervening decades the Tri-City formulation may have come in for minor adjustments, no major overhaul has become necessary. Our greater familiarity with proliferating public bodies might lead us to state with greater liberality the extent to which powers not expressed in the statute can be found by implication, but the overriding command of Tri-City remains intact.



Our focus must be the statute which authorized the creation of the governmental entity. Id., 135 Tex. at 281, 142 S.W. 2d at 946.

Here the relevant statute authorized the purchase, construction and operation of hospitals but did not expressly approve their sale. The mandate to operate the hospital should undoubtedly receive a broad reading that would validate any acts an Authority might undertake to effectuate its views of how best to achieve the hospital's purposes. Even such a broad reading, however, provides no support for the Authority's attempted sale of its only hospital. Far from an effort to operate a hospital, the sale was an attempt to exit the hospital business altogether.[7]

Nor can we say that, apart from the words of the statute, the Authority should possess the inherent ability to make the

sale. As an initial matter, the notion is at least problematic that a body created by the city council to maintain a hospital for the city's residents should be able to decide on its own, without city council or popular approval, to terminate its existence and to sell its public property to private buyers. The potential for public loss or even abuse that such sales would present, coupled with the lack of any indication that sales authority would ordinarily prove necessary or helpful to the hospital's functioning, convinces us that we should find no such authority absent some manifestation of legislative approval. Had the legislature desired to authorize such transactions, it could have said as much.[8]

Our reading of the statute as it existed upon the contract's 1971 formation draws strength from related 1973 and 1975



enactments. In 1973 the legislature enacted Tex.Rev.Civ.Stat. art. 4437e-1, which empowers a Hospital Authority, "[i]n addition to any other powers which it may now or hereafter have," to lease its hospital. Tex.Rev.Civ.Stat. art. 4437e-1 § 1. This provision suggests that the legislature believed an Authority lacked leasing power under the original Act and supports the additional inference that such bodies were without the similar power of sale. More importantly, in 1975 legislature enacted the "Hospital Project Financing Act," Tex.Rev.Civ.Stat. art. 4437e-2. Among the "hospital projects" covered by the new Act were those of art. 4437e Hospital Authorities. The new Act expressly grants an Authority the power "to sell such hospital project to any non-profit corporation...." The clear mandate of that provision is that an Authority may not sell a hospital project

to a for-profit buyer. Had the new Act been in effect at the relevant times, the sale of the Meridian Hospital would undeniably have been improper. As a continuation of the trend toward greater alienation rights begun in 1973, the 1975 Act indicates that in 1971 the Authority did not possess the ability to sell its hospital.

In summary, the generative legislation neither expressly nor implicitly approves an Authority's sale of its hospital. Unlike ordinary or even extraordinary activities undertaken by an Authority as part of its ongoing management of a hospital, a sale deviates from the statutory scheme so drastically as to require legislative support. In this statute there is not such support, and subsequent enactments make clear that none was intended. We must therefore reject the doctor's plea



to hold the Authority to its bargain. The Act may have ambiguities, latent or patent, but one certainty emerges beyond cavil: the statute was not to be used as the instrumentality to subsidize a hospital operated by private interests for profit. This concept, embedded in a hospital's natality, is equally relevant to its demise. The district court's decision is

AFFIRMED.

FOOTNOTES

1. A geriatric center adjointed the 32-bed hospital. In all the relevant transactions the principals treated the two facilities as a unit, and we refer to both when we speak of the "hospital".
2. The hospital received a testamentary grant at about that time, helping eliminate its deficit. Irrespective of this bequest, however, operating income was significantly higher under the new arrangement.
3. The doctors, citizens of foreign countries, invoked the court's diversity jurisdiction, 28 U.S.C. § 1332.
4. The court reasoned that the value of the hospital ($2,000,000) exceeded the sales price ($660,000) and thus constituted, in part, a gift. Appellant notes before us that the



$2,000,000 figure was an estimate of the hospital's 1973 (not 1971) value and that the consideration for the contract also included the doctors' agreement to move their practices to Meridian.

5. Because of our resolution of this issue, we need not reach the two grounds on which the district court reached its decision nor the Authority's alternative arguments that the contract executed by the Board president and acting secretary exceeded the authority the Board had granted them, that Mascarenhas forfeited his option because of "gross negligence" within the relevant contractual provision, that the doctors failed to meet their contractual obligation to provide 24-hour coverage for one year, and

that the condition precedent of federal approval of the sale had not been satisfied.

6. While Tri-City dealt with a Fresh Water Supply District, not a Hospital Authority, the principles are the same. The statute authorizing the governmental unit and the inferences derived from it provide the basis for determining the corporate powers. Whatever label should attach to Hospital Authorities for other purposes, in the context before us the question is whether the statutory scheme authorizes the challenged conduct.

7. Thus we do not have before us a sale of one hospital in connection with the purchase or construction of another. Such a situation would raise different considerations.



8. By this discussion we do not rule out the possibility of sale if truly necessary to prevent the hospital from closing. In the case at bar the district court found no such necessity, and the record does not indicate sufficient necessity to trigger whatever sales authority might exist.

*APPENDIX 2*

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

| | | |
|---|---|---|
| RAUL MASCARENHAS | I | |
| | I | |
| V. | I | CIVIL ACTION NO. |
| | I | W-73-CA-72 |
| | I | |
| MERIDIAN HOSPITAL | I | |
| AUTHORITY, et al | I | |

J U D G M E N T

This action came on for trial before the Court, Honorable Jack Roberts, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is ORDERED and ADJUDGED

that as to Plaintiff's claim for violation of constitutional and civil rights, Plaintiff TAKE NOTHING; and that, as to Plaintiff's claim for breach of contract, Plaintiff Raul Mascarenhas recover of and from Defendant Meridian Hospital Authority the sum of $8,400.00



DATED AT WACO, TEXAS, this 16th day of May, 1975.

DAN W. BENEDICT
UNITED STATES DISTRICT CLERK

By /s/
DEPUTY UNITED STATES DISTRICT CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

| | | |
|---|---|---|
| RAUL MASCARENHAS | I | |
| | I | |
| V. | I | CIVIL ACTION NO. |
| | I | W-73-CA-72 |
| MERIDIAN HOSPITAL | I | |
| AUTHORITY, et al | I | |

MEMORANDUM OPINION AND ORDER

This cause having been submitted to the Court, sitting without a jury, for trial, and the Court having considered all evidence, argument and authorities submitted by the parties, the Court now enters this Memorandum Opinion and Order constituting its findings of fact and conclusions of law. Plaintiff is a medical doctor in the State of Texas. Named Defendants are the Meridian Hospital Authority, members of the Board of Directors of the Authority, sued individually and in their official capacity,



Dr. Harold Hildebrand, Bill Neely, adminstrator of the Meridian Hospital, and Bobbie Rymer, supervisor of nurses at the Meridian Hospital. Plaintiff is a citizen of Brazil, and Defendants are citizens of Texas, giving rise to jurisdiction pursuant to 28 U.S.C. § 1332(a)(2), inasmuch as the amount in controversy exceeds $10,000.

On July 12, 1971, Plaintiff entered into a written contract with the Meridian Hospital Authority granting to him and Dr. Herman Burgos an option to purchase all properties, equipment, drugs, supplies, goodwill and other properties of the hospital, clinic and geriatric center owned by the Authority. As a condition of the contract the doctors agreed to move their practices to Meridian and to provide 24 hour medical coverage for the Meridian Hospital. The doctors further agreed not

exercise their option to purchase the Authority's facilities until at least 24 months after the contract date.

On May 15, 1973, prior to expiration of the 24 month waiting period, however, the Board of Directors of the Authority met and decided, by a 4-3 vote, to rescind the option previously extended to Plaintiff and Dr. Burgos to purchase the Authority's facilities. Tesimony indicated that the decision to sell the facilities had been a subject of heated dispute among Board members since the incipience of the proposal. The Board members' testimony revealed various reasons behind their decision to rescind the option. While the reasons relied upon by the Board in reaching its decision related primarily to an alleged failure of the doctors to provide 24 hour hospital coverage and a general



objection to selling the community's hospital to private interests, these objections were not new. The most cogent explanation of the Board's decision and the timing thereof was offered in the testimony of Board member Henry Bass: The composition of the Board had changed since the 1971 decision to sell the Authority's facilities, and the new majority of the Board viewed their obligation to Plaintiff and their grievances with him in a different light than had the previous Board majority.

After the Board's decision to withdraw the option to sell, tensions and passions continued to grow among the doctors, Board members and hospital staff members. Ultimately, on August 14, 1973, without notice or hearing, the Directors of the Authority suspended the hospital staff privileges of

Plaintiff and Dr. Burgos. After this suit was filed, on September 4, 1973, the Board agreed to permit the doctors access to the hospital until a hearing could be had before the Board. On September 14, 1973, the Board began its hearing on the matter. Because of the large crowd attracted, the hearing was moved from the hospital to the county courthouse. Plaintiff was represented by counsel, charges were provided in writing[1], and witnesses were subjected to cross-examination. After an acrimonious four day hearing the Board voted to restrict the staff privileges of Plaintiff and Dr. Burgos to prohibit their performing certain surgery, except in emergency situations, without the presence of another physician, and ordering the doctors to vacate their offices on the Authority's permises [sic][2].



In January 1974 Plaintiff moved his practice out of the City of Meridian completely.

Plaintiff has asserted claims for violation of his constitutional and civil rights and for breach of contract. At the close of evidence the Court announced its verdict for Defendants on Plaintiff's civil rights claim, reserving decision as to his action for breach of contract.

Plaintiff failed to establish a right to recovery under 42 U.S.C. §§1981, 1983 or 1985. Insofar as he seeks recovery from the Authority under 42 U.S.C. §1983 his claim is barred by City of Kenosha v. Bruno, 412 U.S. 507 (1973). The Supreme Court's determination that a city is not a "person" subject to suit under §1983 applies with equal force to the Meridian Hospital Authority, which was created by city

ordinance pursuant to the Texas Hospital Authority Act, TEX. REV. CIV. STAT. ANN. art. 4437e. Moreover, Plaintiff failed to establish that any director of the Authority

> ...knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the...(doctor) affected, or...(that) he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the (Plaintiff)....

Wood v. Strickland, --U.S.--, 43 U.S.L.W. 4293, 4298 (Feb. 25, 1975). There was no evidence that any act of Defendants Hildebrand, Neely or Rymer deprived Plaintiff of any constitutionally protected rights.

While Plaintiff has no constitutional right to practice in any public hospital,

> Once having become a member of the hospital...staff...(Plaintiff) had a right to reappointment until the governing authorities determined after a hearing conforming to the minimum requirements of procedural due process that he did not meet the reasonable standards of the hospital. The decision resulting from the hearing must be untainted by irrelevant considerations and supported by sufficient evidence to free it from arbitrariness, capriciousness or unreasonableness

Woodbury v. McKinnon, 447 F.2d 839, 842 (5th Cir. 1971). See also Sosa v. Board of Managers of Val Verde Memorial Hospital, 437 F.2d 173 (5th Cir. 1971). The four day hearing afforded Plaintiff before the Board, although significantly short of being a model in procedural due process, satisfied these requirements. While the evidence presented was sharply contested, the Board had before it sufficient evidence to conclude, on a medical basis, that Plaintiff's staff privileges should be substantially curtailed. In light of these circumstances we are guided by the admonition:

> No court should substitute its evaluation of such matters (as ethical and professional competency) for that of the Hospital Board. It is the Board, not the court, which is charged with the responsibility of providing a competent staff of doctors.... Human lives are at stake, and the governing board must be given discretion in its selection so that it can have confidence in the competence and moral commitment of its staff.

Sosa v. Board of Managers of Val Verde Memorial Hospital, supra at 177.

Plaintiff's most powerful claim under §1983 relates to the 21 day suspension of staff privileges imposed upon him without notice or hearing from August 14, 1973, until September 4, 1973. Defendants testified that the decision to suspend Plaintiff's staff privileges summarily resulted from an "emergency" situation. Hospital staff members threatened to walk out, and thus force closing of the community's only hospital,



unless Plaintiff and Dr. Burgos were barred from the facility. Faced with this unhappy choice the Directors determined to keep the hospital open and suspend the staff privileges of Plaintiff and Dr. Burgos. The Board's action in these circumstances did not constitute an intentional, reckless or malicious deprivation of constitutional rights sufficient to impose liability upon the Directors under the standards announced in Wood v. Strickland, supra. Moreover, our decision as to Plaintiff's breach of contract claim would render duplicative any award of damages under §1983 for Plaintiff's 21 day suspension from August 14, 1973, to September 4, 1973.

Turning to Plaintiff's breach of contract claim, we must consider the validity of the Authority's commitment to convey its facilities for substantially

less than fair market value. The contract in question granted to Plaintiff and Dr. Burgos an option to purchase the Authority's facilities, provided the doctors would assume the outstanding bonded or other indebtedness then existing. Plaintiff adduced evidence setting the market value of the facilities to be purchased at some $2,000,000. The only outstanding indebtedness against the facilities was secured by bonds held by the United States Department of Housing and Urban Development in the original principal amount of $660,000. The Authority's contract to sell its facilities for approximately one-third their fair market value is directly violative of both the Texas Constitution and the Texas Hospital Authority Act. Those provisions make clear that the Hospital Authority had no power "to grant public money or



thing of value ... to any individual." TEX. CONST. art. 3, §52. On the contrary, it was under a mandate to operate the hospital "without the intervention of private profit for the use and benefit of the public ...." TEX. REV. CIV. STAT. ANN. art. 4437e, §14. A contract declared illegal by the Constitution and laws of Texas is void and unenforceable. Rich v. Walker Smith Co., 57 S.W.2d 1098 (Tex. Comm'n App. 1933, holding approved); Rivers v. Westbrooks, 126 S.W.2d 46 (Tex. Civ. App. -- Austin 1939, writ ref'd). Thus, the contract between the Authority and the doctors, insofar as it called for the conveyance of hospital facilities for substantially less than their fair market value, was void and unenforceable. Accordingly, Plaintiff is entitled to no damages for breach of contract arising from the Authority's refusal to convey

its hospital facilities. Perkins v. Lambert, 325 S.W.2d 436 (Tex. Civ. App. -- Austin 1959, writ dism'd); Dallas Farm Machinery Co. vs. Minneapolis-Moline Co., 324 S.W.2d 578 (Tex. Civ. App. -- Dallas 1959, no writ).

The contract, however, went farther. In addition to the purported conveyance of hospital facilities, the contract conveyed upon Plaintiff and Dr. Burgos "general supervisory control over the practice of medicine in the hospital..." pending exercise of their option to purchase. Such an agreement is specifically authorized by TEX. REV. CIV. STAT. ANN. art. 4437e-1. While the contract is not clear on the matter, this "general supervisory control" was apparently intended to be revocable on the same grounds as the purchase option. The contract provided for rescission of the option



to purchase by the Authority only in the event of physical or mental incapacity by one of the doctors, or "if one of said Doctors is proven guilty of gross misconduct or gross negligence ...." There has been no allegation of incapacity on the part of either purchasing physician. Moreover, the record is clear that at the time of his 21 day suspension from the hospital Plaintiff had not been proved guilty of "gross misconduct or gross negligence" or any other violation of the terms of his contract with the Authority. Any such proof could only have been adduced at the hearing commenced on September 14, 1973.

When the Board, acting without any proof of misconduct, negligence or breach of contract on Plaintiff's part, voted to bar Plaintiff from the hospital over which it had contractually granted him "general

supervisory control," the Board's actions constituted a breach of the Authority's contract with Plaintiff and Dr. Burgos. The Board acted on behalf of the Hospital Authority, and the Authority must bear the damages for its breach of contract, as it is authorized to do. TEX. REV. CIV. STAT. ANN. art. 4437e, §3.

The Authority's breach of contract deprived Plaintiff of his office space in the old clinic and the right to admit new patients to the hospital. The nearest hospital was in Clifton, some 11 miles away. Thus, the Authority's breach virtually destroyed Plaintiff's medical practice during the unauthorized 21 day suspension of staff privileges. The Court finds reasonable compensation for the injury caused to Plaintiff and his medical practice during that period to be $8400. Total damages in the amount



of $8400 will be assessed against the Meridian Hospital Authority. It is accordingly

ORDERED, ADJUDGED and DECREED that, as to Plaintiff's claim for violation of constitutional and civil rights, Plaintiff TAKE NOTHING; and that, as to Plaintiff's claim for breach of contract, Plaintiff Raul Mascarenhas recover of and from Defendant Meridian Hospital Authority the sum of $8400.00. This Memorandum Opinion and Order shall constitute findings of fact and conclusions of law.

Entered the 15th day of May, 1975, at Austin, Texas.

/s/
JACK ROBERTS
UNITED STATES DISTRICT JUDGE

## FOOTNOTES

1 The "Notice of Hearing" provided Plaintiff stated:

> You, Dr. Raul Mascarenhas, are hereby notified that the Board of Directors of the Meridian Hospital Authority will conduct a hearing at the Hospital Board Room in the Meridian Hospital at 4:00 p.m. September 14, 1973, to determine whether to terminate your appointment to the medical staff of said Meridian Hospital and all privileges had by you pertaining thereto by reason of the following:
>
> (1) Your professional incompetence.
>
> (2) Your neglect of patients.
>
> (3) Your use of abusive and vulgar language to and in the presence of nursing personnel.



> (4) Your failure to be reasonably available for reasonably expected emergencies.
>
> (5) Your failure to be reasonably available for reasonably expected necessary care of patients.
>
> (6) Your over-charging and double-charging of patients for services rendered.
>
> (7) Your misrepresentation of your professional standing at the Cleburne Hospital.
>
> (8) Your misrepresentation of your citizenship on your application for appointment to the medical staff of said Meridian Hospital.

2 The following resolution was announced by the Board on September 28, 1973:

> The Board of Directors of the Meridian Hospital Authority finds and orders that the staff privileges of Dr. Herman Burgos and Dr. Raul Mascarenhas should be and are hereby subject to the following limitations:
>
> Neither Dr. Burgos nor Dr. Mascarenhas shall hereafter perform any orthopedic surgery, open reductions, except in emergency cases, without the presence of another physician other than said Dr. Mascarenhas or Dr. Burgos, which other surgeon shall be a qualified surgeon and a member in good standing of either the county or state medical association wherein he resides.



> It is further ordered by this Board that said doctors vacate the offices presently occupied by them on premises of the Meridian Hospital Authority within ten days hereafter, and that written notice to so vacate by immediate delivery to them or their attorneys.

Transcript of hearing before the Board at 623-24.

APPENDIX 3

Hospital Authority Act

As of July 12, 1971

Creation, title

Section 1. Hospital Authorities without taxing power may be created as hereinafter provided. This law shall be known as the "Hospital Authority Act."

Definitions

Section 2. As used in this law "City" means any incorporated city or town in this State;

"Governing Body" means the council, commission or other governing body of a City;

"Authority" means a Hospital Authority created under this Act;

"Board" or "Board of Directors" means the board of directors of the Authority;

"Bond Resolution" means the resolution authorizing the issuance of revenue bonds;

"Trust Indenture" means the mortgage,



deed of trust or other instrument pledging revenues of, or creating a mortgage lien on properties, or both, to secure the revenue bonds issued by the Authority;

"Trustee" means the trustee under the Trust Indenture.

Ordinance creating authority; territory; body politic and corporate; powers

Section 3. When the Governing Body of a City shall find that it is to the best interest of the City and its inhabitants to create a Hospital Authority, it shall pass an ordinance creating the Authority and designating the name by which it shall be known. If the Governing Bodies of two (2) or more Cities shall find that it is to the best interest of the Cities to create an Authority to include such Cities, each Governing Body shall pass an ordinance creating the Authority and designating the name by which it shall be known. The Authority shall comprise only the territory

included within the boundaries of such City or Cities and shall be a body politic and corporate. It shall have the power of perpetual succession, have a seal, may sue and be sued and may make, amend and repeal its bylaws.

Board of Directors

Section 4. (a) The Authority shall be governed by a Board of Directors consisting of not less than seven (7) nor more than eleven (11) members to be determined at the time of creating the Authority. Except as hereinafter in this Section provided, the first Directors shall be appointed by the Governing Body of the City or by the Governing Bodies of the Cities, and they shall serve until their successors are appointed as hereinafter provided. If Authority includes more than one City, each Governing Body shall appoint an equal number of Directors unless otherwise agreed by the Cities. When the Authority



issues its revenue bonds the resolution authorizing the issuance of the bonds or the Trust Indenture securing them may prescribe the method of selecting and the term of office of a majority of the members of the Board. The remaining members of the Board shall be appointed by the Governing Body of the City or the Governing Bodies of the Cities for two (2) year terms. The Trust Indenture may also provide that, in event of default as defined in the Trust Indenture, the Trustee may appoint all of the Directors, in which event the terms of the Directors then in office shall automatically terminate. Unless and until provision is made in the Bond Resolution or Indenture in connection with the issuance of bonds for the appointment by other means or part of the Directors, all of the Directors shall be appointed by the Governing Body of the City or each of the Cities, as the case may be, for terms not

to exceed two (2) years, but the terms of Directors appointed prior to the issuance of the first issue of revenue bonds shall be subject to the exercise of the provision herein made for made for appointment of a majority of the members of the Board in connection with the issuance of the bonds. No officer or employee of any such City shall be eligible for appointment as a Director. Directors shall not receive compensation for services but shall be entitled to reimbursement of their expenses incurred in performing such service.

(b) In the event the Authority purchases from a nonprofit corporation a hospital then in existence or in process of construction, the first members of the Board of Directors and their successors shall be determined as provided in the contract of purchase.



Officers; quorum; committees; manager or executive director; lease; legal counsel

Section 5. The Board of Directors shall elect from among their members a president and vice-president, and shall elect a secretary and a treasurer who may or may not be Directors, and may elect such other officers as may be authorized by Authority's bylaws. The offices of secretary and treasurer may be combined. The president shall have the same right to vote on all matters as other members of the Board. A majority of the members of the Board shall constitute a quorum and when a quorum is present action may be taken by a majority vote of Directors present. The Board shall employ a manager or executive director of the hospital and such other employees, experts and agents as it may see fit, but it may delegate to the manager the power to employ and discharge employees. The Board may employ

legal counsel.

Construction, operation and equipment of hospitals; location.

Section 6. The Authority shall have the power to construct, enlarge, furnish and equip hospitals, purchase existing hospitals, furnishings and equipment for its hospitals and to operate and maintain hospitals. A hospital need not be located within the City or Cities.

Revenue Bonds

Section 7. The Authority may issue revenue bonds to provide funds for any of tis purposes. Such bonds shall be payable from and secured by a pledge of the net revenues to be derived from the operation of the hospital or hospitals and any other revenue resulting from the ownership of the hospital properties. The bonds may be additionally secured by a mortgage or deed of trust on real property of Authority or by a chattel mortgage on its personal



property, or by both.

Procedure for bond issue; requisites; maturity; sales; registration.

Section 8. The bonds shall be authorized by resolution adopted by a majority vote of a quorum of the Board of Directors, and shall be signed by the president or vice-president and countersigned by the secretary or either or both of their facsimile signatures may be printed thereon. The seal of the Authority shall be impressed or printed threon. The bonds shall mature serially or otherwise in not to exceed forty (40) years and may be sold at a price and under terms determined by the Board of Directors to be the most advantageous reasonably obtainable, provided that the interest cost to the Authority, including the discount, if any, calculated by use of standard bond interest tables currently in use by insurance companies and investment houses does not exceed six percent (6%)

per annum, and within the discretion of the Board, may be made callable prior to maturity at such times and prices as may be prescribed in the resolution authorizing the bonds, and may be made registrable as to principal or as to both principal and interest.

Legal and Authorized Investments

Section 8a. All bonds issued under this Act, as amended shall be legal and authorized investments for all banks, savings banks, trust companies, building and loan associations, savings and loan associations, and insurance companies of all kinds and types, and for the interest and sinking funds and other public funds of any issuer, as such term is defined in this Act. Said bonds also shall be eligible and lawful security for all deposits of public funds of the State of Texas and of any issuer, as such term is defined in this Act, to the extent of the value of said bonds,



when accompanied by any unmatured interest coupons appurtenant thereto.

Bond resolution; publication; referendum.

Section 9. (a) Before authorizing the issuance of bonds, other than refunding bonds, the Board of Directors shall cause a notice to be issued stating that it intends to adopt a resolution (herein called "Bond Resolution") authorizing the issuance of the bonds, the maximum amount thereof, and the maximum maturity thereof. The notice shall be published once each week for two (2) consecutive weeks in a newspaper or newspapers having general circulation in the Authority, the first such publication shall be at least fourteen (14) days prior to the day set for adopting the Bond Resolution.

(b) If, prior to the day set for the adoption of the Bond Resolution, there is presented to the secretary or president of the Board of Directors a petition

signed by not less than ten per cent (10%) of the qualified voters residing within the boundaries of the City or Cities comprising the Authority, who own taxable property in the Authority and who have duly rendered the same for taxation to the City in which such property is located or situated, requesting an election on the proposition for the issuance of the bonds, the bonds shall not be issued unless an election is held and a majority vote is in favor of the bonds. Such election shall be called and held in accordance with the procedure prescribed in Chapter 1, Title 22, Revised Civil Statutes of 1925, as amended, with the Board of Directors, president and secretary performing the functions therein assigned to the governing body of the City, the mayor and city secretary respectively. If no such petition is filed the bonds may be issued



without an election. It is provided, however, that the Board of Directors may call such election on its own motion without the filing of the referendum petition.

Junior lien bonds; parity bonds.

Section 10. Bonds constituting a junior lien on the net revenues of properties may be issued unless prohibited by the Bond Resolution or Trust Indenture. Parity bonds may be issued under conditions specified in the Bond Resolution or Trust Indenture.

Money set aside out of bond sale proceeds.

Section 11. Money for the payment of not more than two (2) years interest on the bonds and an amount estimated by the Board to be required for operating expenses during the first year of operation may be set aside for those purposes out of the proceeds from the sale of the bonds.

Refunding outstanding bonds.

Section 12. Bonds may be issued for

the purpose of refunding outstanding bonds in the manner provided in this Act for other bonds, and may be exchanged by the Comptroller of Public Accounts of the State of Texas or sold and the proceeds applied in accordance with the procedure prescribed in Chapter 503, Acts of the Fifty-fourth Legislature.

Approval of bonds by the attorney general; registration; incontestability; negotiability.

Section 13. Bonds issued under this Act and the record relating to their issuance shall be submitted to the Attorney General of Texas and if he finds that they have been issued in accordance with this law and constitute valid and binding obligations of the Authority and are secured as recited therein he shall approve them, and they shall be registered by Comptroller of Public Accounts of the



State of Texas who shall certify such registration thereon. Thereafter they shall be incontestable. The bonds shall be negotiable and shall contain the following provision: "The holder hereof shall never have the right to demand payment thereof out of money raised or to be raised by taxation."

Operation of hospital; rates charged; creation of funds; lease conditions.

Section 14. The hospital shall be operated without the intervention of private profit for the use and benefit of the public. But it shall be the duty of the Board of Directors to charge sufficient rates for services rendered by the hospital and to utilize other sources of its revenues that revenues will be produced sufficient to pay all expenses in connection with the ownership, operation and upkeep of the hospital, to pay the interest on the bonds as it becomes due, to

create a sinking fund to pay the bonds as they become due, and to create and maintain a bond reserve fund and other funds as provided in the Bond Resolution or Trust Indenture. The Bond Resolution or Trust Indenture may prescribe systems, methods, routines and procedures under or in accordance with which the hospital shall be operated.

Depositories

Section 15. The Authority may select a depository or depositories according to the procedures provided by law for the selection of city depositories or it may award its depository contract to the same depository or depositories selected by the City or Cities and on the same terms.

Tax Exemption

Section 16. Recognizing the fact that the property owned by Authority will be held for public pruposes only and will be



devoted exclusively to the use and benefit of the public, it shall be exempt from taxation of every character.

Eminent Domain

Section 17. For the purpose of carrying out any power conferred by this Act, Authority shall have the right to acquire the fee simple title to land and other property and easements by condemnation in the manner provided by Title 52, Revised Civil Statutes as amended, relating to eminent domain. Authority is hereby declared to be a municipal corporation within the meaning of Article 3268 of said title 52. The amount of and character or interest in land, other property and easements thus to be acquired shall be determined by the Board of Directors.

Investment of funds and proceeds of bonds.

Section 18. The law as to the security

for and the investment of funds, applicable to Cities, shall control, insofar as applicable the investment of funds belonging to Authority. The Bond Resolution or the Indenture or both may further restrict the making of such investments. In addition to other powers Authority shall have the right to invest the proceeds of its bonds, until such money is needed, in the direct obligations of or obligations unconditionally guaranteed by the United States Government to the extend authorized in the Bond Resolution or Indenture, or in both.

Donations, gifts and endowments.

Section 19. The Board of Directors is authorized to accept donations, gifts and endowments to be held and administered as may be required by the respective donors, to the extent that such requirements would not contravene law.



Acts 1957, 55th Leg., p. 1379, ch. 472. Amended by Acts 1963, 58th Leg., p. 1273, ch. 487, § 1.

APPENDIX 4

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

NO. 75-2682

---

RAUL MASCARENHAS,

Plaintiff-Appellant

versus

MERIDIAN HOSPITAL AUTHORITY, ET AL.,

Defendants-Appellees.

- - - - -

Appeal from the United States District Court for the Western District of Texas

- - - - -

ON PETITION FOR REHEARING

(November 7, 1977)

Before TUTTLE, GOLDBERG and CLARK, Circuit Judges.



PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Irving L. Goldberg
United States Circuit Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of January, 1978, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to W. V. Dunnam, Jr., Dunnam, Dunnam and Dunnam, 4125 W. Waco Drive, Waco, Texas 76710, Counsel for Respondent, and three copies were mailed, postage prepaid, to Jack Welch, P. O. Box 534, Marlin, Texas 76661, Counsel for Respondent. I further certify that all parties required to be served have been served.

William F. Kemp

William F. Kemp
P. O. Box 369
1900 American Bank Tower
Austin, Texas 78767

Counsel for Petitioner

Supreme Court, U. S.
FILED
MAR 22 1978
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-984

RAUL MASCARENHAS,

Petitioner,

VERSUS

MERIDIAN HOSPITAL AUTHORITY,

Respondent.

## RESPONDENT'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

W. V. DUNNAM, JR.
DUNNAM, DUNNAM & DUNNAM
4125 W. Waco Drive
Post Office Box 8418
Waco, Texas 76710

ATTORNEYS FOR RESPONDENT,
MERIDIAN HOSPITAL AUTHORITY

## TABLE OF CONTENTS


Page

I. Reasons for Denying Writ . . . . . .1

Statement, Argument and Authorities . . . . . .2

Conclusion and Prayer . . . . . .8

Certificate of Service . . . . . .9

## TABLE OF AUTHORITIES


Page

Article 3, Sec. 52
Constitution of the State of Texas .....3

Article 4437E V.A.T.S. .....2

*B County v. Roberts*, 437 S.W.2d 62 .....6

*Boone v. Pierce*, 218 S.W.2d 347 .....2

*Corbin v. Slagel*, 300 S.W.2d 657 .....6

*Eastex Wildlife Conservation Ass'n. v. Jasper County Dog and Wildlife Protective Ass'n.*, 450 S.W.2d 904 .....6

*Grimes v. Bosque County*, 240 S.W.2d 511 .....4

*McCrory v. Smeltzer*, 124 S.W.2d 339 (Supreme Court of Texas) .....3

*Swain v. Montgomery*, 154 S.W.2d 695 .....6

USCA, Title 42, Sec. 291 .....2

*Wilson v. Calhoun County*, 489 S.W.2d 939 .....6

Yorkley, Municipal Corporations, Vol. 2, Sec. 432B .....7

13 Tex. Jur. 2nd, Sec. 202 .....4

13 Tex. Jur. 2nd, Sec. 280 .....5




**IN THE**
**SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM, 1977**

---

**NO. 77-984**

---

**RAUL MASCARENHAS,**
**Petitioner,**

**VERSUS**

**MERIDIAN HOSPITAL AUTHORITY,**
**Respondent.**

---

# RESPONDENT'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

## I.

## REASONS FOR DENYING WRIT

The decision below does not conflict with any decision of the Supreme Court or any other court of appeal and correctly decides all state questions in accordance with applicable state law.

## STATEMENT, ARGUMENT AND AUTHORITIES

Article 4437(E) V.A.T.S. creating the Hospital Authority was enacted by the Texas Legislature for the purpose of carrying into effect the Federal Statutes authorizing Federal funding of *public and other non-profit* community hospitals. The law is settled in Texas that a Contract that is contrary to the purpose, spirit and policy of a Federal or State Statute is against public policy and is void even though said Contract is not actually illegal per se. *Boone v. Pierce*, 218 SW2nd 347. The policy, spirit and purpose of the Federal Statutes authorizing the Federal funding of the Hospital Authority is declared in *U.S.C.A., Title 42, Sec. 291*, as follows:

> "Sec. 291. CONGRESSIONAL DECLARATION OF PURPOSE.
> The purpose of this subchapter is –
> (a) to assist the several States in carrying out of their programs for the construction and modernization of such *public or other non-profit* community hospitals and other medical facilities as may be necessary, in conjunction with existing facilities, to furnish adequate hospital, clinic, or similar services to all their people."

*Article 4437E V.A.T.S.* creating the Hospital Authority provides as follows:

> "Sec. 14. The hospital shall be operated *without the intervention of private profit* for the use and benefit of the public . . ."
>
> "Sec. 16. Recognizing the fact that the property owned by Authority *will be held for public purposes only* and *will be devoted exclusively to the use and benefit of the public*, it shall be exempt from taxation of every character."



The Contract in question simply provides that if Mascarenhas and Burgos move to Meridian, practice in said hospital and furnish twenty-four hour coverage for twelve months that they will have a twenty year option right to have said hospital and all of its facilities given to them subject to the debt against same. The use of said Federal and State Statutes and Federal funds for the acquisition of privately owned and operated hospitals for private gain is patently against public policy as declared by said Statutes. That such is void is clearly settled by the decisions of the Supreme Court of Texas as follows:

> "(1) . . . Such an agreement is contrary to the purpose, spirit and policy of the law under which the bonds of the Federal Farm Mortgage Corporation were exchanged for the prior vendor's lien notes, and was therefore void . . .
>
> The purpose and true spirit of the law under which bonds of the Federal Farm Mortgage Corporation are issued in lieu of pre-existing indebtedness is the same as under the law pertaining to bonds of the Home Owners Loan Corporation . . .
>
> We conclude therefore that the notes in question, insofar as they brought forward any part of the previous vendor's lien notes, are void, and the lien securing same is also void." *McCrory v. Smeltzer*, 124 SW2nd 339 (Supreme Court of Texas)

Furthermore, said Contract not only violates the spirit and policy declared by *Article 3, Sec. 52* of the Constitution of the State of Texas adopted November 3, 1970, but is directly and expressly forbidden by said provision of said Constitution which provides as follows:

"Sec. 52. COUNTIES, CITIES, TOWNS OR OTHER POLITICAL CORPORATIONS OR SUBDIVISIONS; LENDING CREDIT; GRANTS

Sec. 52. (a) Except as otherwise provided by this section, the Legislature shall have no power to authorize any county, city or town or other political corporation *or subdivision of the State* to lend its credit or *to grant* public money or *thing of value* in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company."

Mascarenhas adduced undisputed evidence that the hospital facilities had a market value of two million dollars and that the only indebtedness against the same was six hundred thousand dollars, thus rendering the equity therein a *thing of value* as a matter of law. Granting to them an option to demand conveyance of title to them to said public facility any time they desire for twenty years in the future merely subject to their assuming the existing debt against same is manifestly violative of the spirit, policy and express words of said Constitutional provision. As stated in *Grimes v. Bosque County*, 240 SW2nd 511,

> "(3-6) . . . The expenditure of public funds is jealously guarded by our Constitution and the Commissioners Court has no authority to make any gratuitous grant of funds or to use the public credit for the benefit of an individual . . ."

That which is void is forever void, there can be no ratification thereof, estoppel based thereon, nor damages recovered for breach thereof. The law is well stated in *13 Tex. Jur. 2nd, Sec. 202* as follows:

> "As a general rule, an illegal contract is void and unenforceable, and will not support a remedy in a court of justice. Such a contract is 'void' and not merely 'voidable', since no express disaffirmance is required to avoid it. Furthermore, such a contract cannot be ratified. Consequently, it is declared that the parties to an illegal contract cannot recover from each other for anything done or promised in carrying out the agreement. In other words, an illegal contract cannot impose any legal obligations on the parties thereto or constitute the basis of any enforceable legal or equitable rights that might otherwise arise from a breach of the agreement."



Apart from the Contract being void for being against public policy and illegal, Plaintiff, as a matter of law, wholly failed to prove the occurrence of an expressly stated condition precedent to any validity of the Contract. The Contract itself expressly provided as follows:

> "(5) (a) It is understood that Authority in selling the bonds to HUD entered into an indenture mortgage and *any sale thereof shall be subject to the approval of HUD* and this option contract is conditioned that before any sale is consummated it shall meet the requirements of HUD with regard thereto or if said bonds have been sold or disposed of by HUD it shall meet the approval of the Trustee in said indenture."

*Any sale under the Contract shall be subject to the approval of HUD.* Not only did Plaintiff fail to prove this condition precedent to any cause of action but Defendant went further than necessary and proved conclusively that HUD had not approved thereof. As stated in *13 Tex. Jur. 2nd, Sec. 280,*

> "If a promise is made subject to the happening of a condition precedent, no liability or obligation can arise on the part of the promisor, and there can be no breach of the contract by him, until the condition occurs or is performed."

Moreover, the undisputed testimony including that of Mascarenhas and Burgos conclusively established a breach of the further condition precedent that one of the doctors or another qualified physician provided by them would maintain twenty-four hour coverage during the first year of the alleged Contract. The doctors admitted said breach and their only defense thereto was the contention that such was waived by the Board. The record showed that the Board acting as a body never at any time took any action that might be construed as a waiver of said breach. Plaintiff's contention that he told Jack Cureton and Brister at Cureton's office that if there was going to be anything raised about his breach later on then he wanted to void the Contract as of then and that said Cureton and Brister acquiesced at said time is of no relevance whatsoever since it is elemental law that a governing board of any subdivision of the State can only be bound or affected by act of said board acting as a body and not by actions of an individual member or members apart therefrom. *Swain v. Montgomery*, 154 SW2nd 695, *Wilson v. Calhoun County*, 489 SW2nd 939, *Eastex Wildlife Conservation Ass'n. v. Jasper County Dog and Wildlife Protective Ass'n.*, 450 SW2nd 904, *B County v. Roberts*, 437 SW2nd 62. To have waived said admitted breach by the absence of both of said doctors for four to five weeks without providing another qualified physician during said period the Board would have had to have acted as a body and done some clear, unequivocal and decisive act evidencing its intention to waive. *Corbin v. Slagel*, 300 SW2nd 657. Such was not shown or intimated in this case.

The record was also undisputed that the Contract signed by Brister in Cureton's office on July 12 was not the Contract authorized by the Board three days earlier on July 9 (App. 557) and therefore, the Contract executed by Brister was without the scope of his authority and is not binding upon the Board. Also, even if the Contract had been authorized by the Board, which it patently was not, its execution would be beyond the



authority of the Board since property held in a governmental capacity cannot be sold by a subdivision of the State without legislative authority. *Yorkley, Municipal Corporations, Vol. 2, Sec. 432B.* It should be noted that the Hospital Authority is not only without any authority to give or convey the hospital property, but did not even have the power to enter into a lease of hospital property until June 14, 1973, when the Legislature passed Article 4437E-1 specifically authorizing the authority under given conditions to lease hospital property.

In addition to the above, the Contract provides that, "if one of said doctors is proven guilty of gross misconduct or gross negligence then the Authority will have the right to withdraw the purchase option from said doctor" and the testimony of Nurse Montinez as to Mascarenhas scheduling and attempting to perform a hiatal hernia operation when he was warned before hand that he did not have the instruments to perform same (App. 467) and also when the undisputed evidence of even Burgos showed he was not qualified to perform such an operation (App. 238) and his announced decision not to remove the metal pin he had driven beyond the bone until three days thereafter because he had patients waiting in his office (App. 475) compels a finding of gross neglect. Such finding is further compelled by the express testimony of Dr. Hilderbrand, a Scott and White trained physician, that each of said acts by Mascarenhas was such a heedless disregard of the patient's interest and such an entire want of care as to raise a presumption of conscious indifference to the patient's welfare. It should be noted that the Court actually made no finding as to the issue of fact as to whether Mascarenhas had, in fact, been guilty of gross neglect, but merely stated that at the time the Board first could have had proof of such would have been at the hearing on September 14, 1973. We respectfully submit that the evidence is undisputed that the acts of Mascarenhas constituted gross neglect, but that if the same is not established as a matter of law then such was an issue of fact that the Trial Court has not

yet passed upon due to its conclusion that the Contract was against public policy and thus void.

## CONCLUSION AND PRAYER

The Judgment of the Trial Court and Court of Appeals is correct and writ of certiorari should be denied and it is accordingly so prayed.

DUNNAM, DUNNAM & DUNNAM
4125 W. Waco Drive
Post Office Box 8418
Waco, Texas 76710

W. V. Dunnam, Jr. - Attorneys for
Respondent, Meridian Hospital Authority



## CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above Brief has been duly mailed to counsel for Petitioner on this 20th day of March, A.D. 1978.

W. V. Dunnam, Jr. - Attorney for
Respondent, Meridian Hospital Authority